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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AHSAN MOHIUDDIN,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,

Defendant and Respondent.

B203745

(Los Angeles County
Super. Ct. No. BC323663)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed.

Ahsan Mohiuddin, in pro. per., for Plaintiff and Appellant.

Schaffer Lax McNaughton Chen, Stephen A. Lax and Brian G. Buron for
Defendant and Respondent.

Plaintiff appeals from a summary judgment granted in favor of the City of Los Angeles (City) on the ground that the action was barred by both the one-year and the two-year statute of limitations.¹ We affirm the judgment, rejecting plaintiff's contentions that (1) the action is timely filed under the delayed discovery doctrine and (2) the statute of limitations defense is barred by the equitable estoppel doctrine. We also reject plaintiff's claim of untimely service of notice of the summary judgment motion and his challenge to the trial court's order denying his motion to bifurcate the trial.

BACKGROUND

As plaintiff did not respond in any fashion to City's separate statement of undisputed facts, those facts remain undisputed. We therefore obtain the facts from City's separate statement. (See *Ashdown v. Ameron Internat. Corp.* (2000) 83 Cal.App.4th 868, 874 [appellate court considers only facts before trial court, disregarding new factual allegations made for first time on appeal].)

Plaintiff alleges that he was injured on June 8, 2001, while attempting to alight from a DASH shuttle bus while it was still moving. On December 5, 2001, plaintiff filed a written claim with City for injuries sustained in the June 2001 incident. By operation of Government Code section 912.4, subdivision (c), plaintiff's claim was deemed denied by City's failure to respond or to extend the period for response within 45 days after the claim was submitted.² After filing his initial claim, and then another claim in June 2004

¹ "In 2002, the Legislature amended [Code of Civil Procedure] section 340, subdivision (3), to delete the one-year limitations period for personal injury actions. At the same time, it added [Code of Civil Procedure] section 335.1, which now provides a two-year statute of limitations for such actions." (*Krupnick v. Duke Energy Morro Bay* (2004) 115 Cal.App.4th 1026, 1028 [Code of Civil Procedure section 335.1 did not apply retroactively to personal injury action filed in 2003 based on accident in 2001].)

² Under Government Code section 912.4, subdivision (a), City was required to act on a claim within 45 days after the claim has been presented. Under the circumstances specified in subdivision (b) of Government Code section 912.4, the period to act on the claim may be extended by written agreement. Government Code section 912.4, subdivision (c) provides: "If the board [the governing body of City] fails or refuses to act (footnote continued on next page)

based on the same June 2001 incident, plaintiff took no further legal action against City until he filed his original complaint in the superior court on October 27, 2004, and then a first amended complaint (complaint) in February 2005. Named as defendants in the original complaint were City, First Transit, Inc., and Creative Bus Sales, Inc. The trial court sustained without leave to amend the demurrer of Creative Bus Sales on statute of limitations grounds, which ruling was upheld in a prior appeal by plaintiff. (*Mohiuddin v. Creative Bus Sales, Inc.* (July 31, 2006, B185192) [nonpub. opn.].) In November 2006, the trial court granted judgment on the pleadings in favor of First Transit on statute of limitations grounds, which judgment was affirmed on appeal. (*Mohiuddin v. First Transit, Inc.* (Dec. 2, 2008, B196395) [nonpub. opn.].)

On May 16, 2007, City filed and served on plaintiff a motion for summary judgment based on the bar of the statute of limitations. The motion was scheduled to be heard on August 2, 2007.

A day before City filed its motion, plaintiff filed a motion to stay proceedings in the trial court pending his appeal of the judgment in favor of First Transit, but the court denied plaintiff's request in June 2007. In July 2007, plaintiff filed an "objection" to City's summary judgment motion and three motions of his own.

In his "objection," plaintiff argued that the hearing on the motion was not set with the required 80 days' notice for service by mail, as the motion papers were mailed to him on May 16, only 77 days before the August 2 hearing date.³ City responded to the

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on a claim within the time prescribed by this section, the claim shall be deemed to have been rejected by the board on the last day of the period within which the board was required to act upon the claim. If the period within which the board is required to act is extended by agreement pursuant to this section, the last day of the period within which the board is required to act shall be the last day of the period specified in the agreement."

³ Code of Civil Procedure section 437c, subdivision (a) provides in pertinent part: "Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing. However, if the notice is (footnote continued on next page)

“objection” by providing a proof of service showing that plaintiff was served with the summary judgment motion on May 16, 2007, when the papers were “slotted” by a delivery service, which the trial court interpreted to mean placed in plaintiff’s mail slot on May 16. In response to City’s proof of service, plaintiff filed a motion to strike the summary judgment motion for lack of timely service; in his declaration he denied that he was personally served on May 16. In connection with the motion to strike, plaintiff filed a motion requesting a continuance of the summary judgment motion for the purpose of obtaining evidence on the issue of service to support his motion to strike.

Plaintiff also filed a motion to bifurcate the trial to first litigate the statute of limitations defense and whether City was estopped from asserting it. In his motion, plaintiff asserted that the first amended complaint adequately pleaded the elements of equitable estoppel as a bar to the statute of limitations defense.

At the hearing on August 2, 2007, the court found that the delivery of the motion to plaintiff’s home on May 16, 2007, constituted proper service and the notice was therefore sufficient. The court thus implicitly denied plaintiff’s motion to strike and to continue the summary judgment motion. The trial court then granted summary judgment on the ground that the action was barred by both the one-year and the two-year statute of limitations. The court determined that the motion to bifurcate the trial was moot and did not address the motion’s merits.

Plaintiff appealed from the summary judgment in favor of City.

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served by mail, the required 75-day period of notice shall be increased by five days if the place of address is within the State of California . . . , and if the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days. . . .”

DISCUSSION

On appeal from a summary judgment, we independently examine the record to determine whether triable issues of fact exist to reinstate the action. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) Plaintiff raises only two contentions in his opening brief: (1) the trial court erred in applying and interpreting the delayed discovery rule and (2) the trial court abused its discretion in denying his motion for leave to file a second amended complaint.

Notwithstanding plaintiff's failure to raise the issue of the delayed discovery rule in opposition to City's motion, we independently examine the complaint and determine that it fails to allege facts establishing delayed discovery. Relying on *Erde v. City of Los Angeles* (1953) 116 Cal.App.2d 565 (*Erde*), plaintiff contends that there are triable issues of fact as to whether he "did or did not have actual or presumptive knowledge of his injuries until November 2003" *Erde* is inapposite. *Erde* was struck by a falling light standard and the trial court sustained the city's demurrer on the ground that the complaint and the attached claim showed that the action was barred by the affirmative defense of assumption of the risk. In reversing the judgment, the Court of Appeal held that the pleading contained conflicting inferences as to whether the defendant was entitled to the complete defense of assumption of the risk or only the defense of *Erde*'s contributory negligence. (*Erde, supra*, 116 Cal.App.2d at pp. 568–569.)

Unlike the situation in *Erde*, there are no competing inferences here because the complaint shows that plaintiff sustained actual and appreciable harm to commence the running of the statute of limitations at the latest in December 2001, when he filed his claim for damages against City. Plaintiff contends that the statute began to run in late 2003, when he obtained a diagnosis of necrosis of his hips and was undergoing postsurgical treatment for hip replacement surgery. But the extent of damage is not an element of a tort cause of action and the general rule is that the cause of action is complete on the sustaining of "“actual and appreciable harm”" for which the recoverable damages would be more than nominal. (*Miller v. Lakeside Village Condominium Assn.* (1991) 1 Cal.App.4th 1611, 1623.) That a medical condition may

not have been diagnosed, or diagnosed correctly, does not delay the running of the statute of limitations. (*Id.* at pp. 1624–1625.) Because the allegations of the complaint bearing on the delayed discovery rule support only the inference that the cause of action had accrued by December 2001, the complaint is insufficient to invoke the delayed discovery rule as a matter of law. (*Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 300.)

We also reject plaintiff’s challenge to the order denying his motion for leave to file a second amended complaint because the contention is not supported by pertinent argument or authority (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685 [to show error, appellant must provide reasoned argument and legal authority]) and the alleged error is not shown to be prejudicial (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 347–348 [appellant must show that error was prejudicial, that is, a reasonable probability that more favorable result would have occurred absent the error]).

In an “errata” to his opening brief, plaintiff challenges the trial court’s rulings denying his “objection” to the summary judgment motion as untimely served, denying his bifurcation motion, and granting the summary judgment motion.

Plaintiff contends that the trial court lacked jurisdiction to hear the summary judgment motion as untimely served because the proof of service, showing the motion was placed in his mailbox, was too vague and speculative. He also argues that “it is a very well known fact and ‘common knowledge’ that apartments in our state and particularly the county of Los Angeles, do not have open to public mail boxes or slots but have mail boxes with locks whose keys are possessed only by the residents of the apartments and the mail carriers.” The trial court implicitly drew the inference that the summary judgment motion was timely delivered to plaintiff’s mailbox under Code of Civil Procedure section 437c, subdivision (a), and the inference is adequately supported by the proof of service in the record. Plaintiff is now seeking to proffer additional evidence not before the trial court and is urging us to draw inferences contrary to those drawn by the trial court, which we cannot do.

With respect to the merits of the summary judgment motion, plaintiff contends that he adequately pleaded that City was estopped to assert the statute of limitations defense by virtue of the “fraud” allegations in paragraphs 13, 14, 16, 18, and 26 of his complaint. Therein, plaintiff alleged that from February 2002 through December 2003, City and its employees falsely assured him that his claim was being processed “impliedly favorably through contact with ‘appropriate’ insurance,” when City knew that its independent contractors, Creative Bus Sales, Inc., and First Transit, Inc., lacked proper liability insurance. City allegedly made these misrepresentations for the purpose of “stalling” his claims until the statute of limitations on his personal injury claim expired.

Under appropriate circumstances, the doctrine of equitable estoppel will preclude a defendant from relying upon the bar of the statute of limitations if the plaintiff has been induced to refrain from bringing a timely suit by the fraud, misrepresentation or deception of the defendant. (*Sofranek v. County of Merced* (2007) 146 Cal.App.4th 1238, 1250.) But “[t]he defendant’s statement or conduct must amount to a misrepresentation bearing on the *necessity* of bringing a timely suit; the defendant’s mere denial of *legal liability* does not set up an estoppel.” (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384, fn. 18.) And the defendant’s statements or conduct must induce the plaintiff “*actually and reasonably*” to delay in filing his action. (*Id.* at p. 385 [complaint devoid of any indication that the defendants’ conduct “*actually and reasonably*” induced the plaintiffs to forbear suing within limitation period].)

The complaint does not allege facts showing that plaintiff’s delay in filing suit was *reasonable* because plaintiff’s claim was deemed denied, under the provisions of Government Code section 912.4, subdivision (c) 45 days after it was submitted on December 5, 2001, or by January 20, 2002. City’s conduct in referring his claim to its independent contractors, whether insured or not, also has no bearing on the issue of the necessity for plaintiff to file a timely suit. Accordingly, the allegations in the complaint do not meet the requirements for an estoppel against City to assert the statute of limitations defense.

Finally, plaintiff cites no authority to support his contention that the trial court erred in denying his bifurcation motion as moot.

In its respondent's brief, City asserts that the appeal is frivolous and seeks sanctions against plaintiff. Under the standards set out in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, we deny City's request for sanctions.

DISPOSITION

The summary judgment is affirmed. City is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.